APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-1141

BALTIMORE SCRAP CORPORATION, formerly known as Brooklyn Salvage Corporation,

Plaintiff-Appellant,

v.

THE DAVID J. JOSEPH COMPANY, t/a United Iron & Metal Company; DAVID J. WORKUM, III; JOHN DOES 1-10; I. D. SHAPIRO; JAMES SHAPIRO; CHARLES BAUM; UNITED HOLDINGS COMPANY, INCORPORATED; UNITED OPERATING COMPANY, INCORPORATED; UNITED INVESTMENT ENTERPRISES PARTNERSHIP,

Defendants-Appellees.

FRANCIS X. DUGGAN; RICH & HENDERSON, PC; DONALD LEVENSON; MARLEN TRADING COMPANY; ISAAC M. NEUBERGER; THOMAS M. WOOD, IV; WARREN K. RICH; TIMOTHY R. HENDERSON; DAVID B. IRWIN,

Movants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Benson E. Legg, District Judge.
(CA-96-827-L)

Argued: November 1, 2000

Decided: January 18, 2001

Before WILKINSON, Chief Judge, WILLIAMS, Circuit Judge, and Frank J. MAGILL, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Williams and Senior Judge Magill joined.

COUNSEL

ARGUED: Lewis A. Noonberg, PIPER, MARBURY, RUDNICK & WOLFE, L.L.P., Baltimore, Maryland, for Appellant. G. Jack Donson, TAFT, STETTINIUS & HOLLISTER, L.L.P., Cincinnati, Ohio; Carter G. Phillips, SIDLEY & AUSTIN, Washington, D.C., for Appellees. **ON BRIEF:** Kathleen A. Ellis, PIPER, MARBURY, RUDNICK & WOLFE, L.L.P., Baltimore, Maryland; Charles S. Hirsch, Robert A. Scott, BALLARD, SPAHR, ANDREWS & INGERSOLL, L.L.P., Baltimore, Maryland, for Appellant. Daniel R. Warncke, TAFT, STETTINIUS & HOLLISTER, L.L.P., Cincinnati, Ohio; Robert J. Carson, Gary R. Jones, Baltimore, Maryland, for Appellees; Thomas M. Wood, IV, Allan P. Hillman, NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A., Baltimore, Maryland, for Appellees.

OPINION

WILKINSON, Chief Judge:

This antitrust case stems from a protracted dispute over Baltimore Scrap Corp.'s attempt to install a scrap metal shredder in Baltimore, Maryland in 1991. Baltimore Scrap alleges that the defendants violated the Sherman Act, 15 U.S.C. § 1 (1994), by surreptitiously financing litigation in state court in order to prevent or delay Baltimore Scrap's entry into the market. The defendants argue that the *Noerr-Pennington* doctrine immunizes those who petition the courts from antitrust liability. The district court ruled that although the defendants' conduct was wrong, it was nonetheless protected by *Noerr-Pennington*. *See Baltimore Scrap Corp. v. The David J. Joseph Co.*, 81 F. Supp.2d 602, 603 (D. Md. 2000). Because neither the sham exception nor the fraud exception to *Noerr-Pennington* immunity applies here, we affirm the judgment of the district court.

I.

On July 15, 1991, Baltimore Scrap leased land in the city of Baltimore in order to install a metal shredder there. Baltimore Scrap's proposed shredder caused great concern among two groups. The first was comprised of citizen associations of Baltimore who opposed the shredder on environmental grounds. These organizations voiced their opposition to the Maryland Department of Environment and to the Mayor of Baltimore in August of 1991.

The defendants, including The David J. Joseph Co. (DJJ), I.D. Shapiro, and the Shapiro family, composed the second group. The defendants controlled the only other metal shredder in the Baltimore area. DJJ and Shapiro wanted to ensure that their shredder maintained its monopoly in that area. Unlike the citizen groups, however, DJJ and Shapiro did not publicly voice their concerns about Baltimore Scrap's proposed shredder. Indeed, until their role was inadvertently revealed in late March of 1993, the defendants' plan to prevent Baltimore Scrap from building a shredder was a closely-guarded secret.

In September of 1991, Baltimore Scrap applied for a zoning permit from the Baltimore City Board of Municipal and Zoning Appeals. In November, the leaders of the citizen groups testified against the permit. One week later, the Board denied Baltimore Scrap's application. Baltimore Scrap appealed this decision to the Baltimore City Circuit Court, which upheld the Board.

In May of 1992, Baltimore Scrap filed a new zoning application with the Board. Because the Baltimore zoning code does not allow the Board to consider "substantially the same proposal" until twelve months after the previous application was denied, Baltimore Scrap changed its application to add new protections against soil contamination at the site. The Board ruled that the application was different enough to warrant a new hearing even though twelve months had not elapsed since the previous denial of the permit. The Board then approved a permit for Baltimore Scrap on August 6, 1992.

At this point, Shapiro decided to secretly fight the approval of the permit. Shapiro's attorney contacted another lawyer, David Irwin, to handle the appeal. An employee from a different company co-owned by Shapiro contacted Gloria Sipes. Sipes was the president of one of the citizen groups, the Community of Curtis Bay Association. The employee told Sipes that local businesses would pay for an attorney if the citizen groups wanted to appeal the Board's decision. The employee told Sipes to contact David Irwin for the appeal. The caller did not reveal her identity, or who she represented. Sipes consulted with the other citizen groups, and they decided to accept the support of their unknown benefactor. The citizen organizations did not ask who was funding the appeal and "did not care" who paid the lawyer.

Irwin filed his appeal on behalf of the citizen groups on August 27, 1992. Irwin understood that DJJ and Shapiro controlled the appeal. Baltimore Scrap moved to dismiss the appeal based on the citizen groups' lack of standing. After the statutory appeal period expired, Sipes moved to intervene

in the lawsuit as an individual party. Judge Ward of the Baltimore City Circuit Court ruled that the citizen groups and Sipes all had standing, and granted Sipes' motion to intervene. He thus denied Baltimore Scrap's motion to dismiss.

Chief Judge Hammerman, also of the Baltimore City Circuit Court, heard the citizen groups' appeal on the merits on January 7, 1993. He agreed with Judge Ward that Sipes' motion to intervene was timely. After originally ruling for the citizen groups on the merits, Chief Judge Hammerman eventually affirmed the Board's decision to grant Baltimore Scrap a permit once the Board clarified a technical point. The citizen groups filed a motion with Chief Judge Hammerman to stay his decision pending appeal.

Throughout this time, DJJ and Shapiro left no public trace of their involvement in the lawsuit. In late March, however, a so-called "errant fax" exposed the role of the defendants. This fax was supposed to go to a lawyer working for DJJ and Shapiro, but instead was sent to a friend of Baltimore Scrap's president. On April 3, Irwin met with representatives from the citizen groups involved the lawsuit. He told them that DJJ and Shapiro were funding the litigation. He asked them whether they wanted to continue with the appeal. The citizen groups decided to keep pursuing the appeal, despite the knowledge of DJJ and Shapiro's involvement.

Baltimore Scrap argued in its opposition to the motion to stay that the lawsuit was a fraud because DJJ and Shapiro were the real parties in interest. Irwin responded in his pleadings that the notion that the defendants directed the conduct of this case or drafted the previous motion was "preposterous, inflammatory, and not based in reality." Irwin emphasized in open court during an April 23 hearing on the motion to stay that the citizen groups were the only parties he represented. When Chief Judge Hammerman questioned Irwin about the errant fax, Irwin told the judge that nothing in the errant fax "says my law firm is involved with" DJJ and Shapiro. Irwin stated to the court, "I continue to deny, as my

papers do, that I am representing anyone but the people represented here." Chief Judge Hammerman denied Irwin's motion to stay because he thought that the citizen groups did not have a likelihood of success on appeal. In reaching this decision, Chief Judge Hammerman observed that he saw the hand of the defendants in the lawsuit, and that "they have gone from the role of an interested observer to the role of an active participant."

Despite the denial of the motion to stay, the citizen groups appealed to the Maryland Court of Special Appeals. In a twelve-page opinion, the Court of Special Appeals denied the appeal. *See Sipes* v. *Board of Municipal and Zoning Appeals*, 635 A.2d 86 (Md. Ct. Spec. App. 1994). It called the case "dead on arrival in the circuit court" because the citizen groups did not have standing since they were neither an aggrieved party nor a taxpayer. *Id.* at 97; *accord id.* at 89. Although Sipes as an individual did have standing, her motion to intervene was time-barred as a logical extension of the citizen groups' lack of standing. *Id.* at 94. The citizen groups did not pursue an appeal from this decision. Baltimore Scrap's shredder became fully operational in July, 1993.

Baltimore Scrap sued DJJ, the Shapiro family, and the Shapiro family's companies. The complaint alleged violations of the Sherman Act, 15 U.S.C. § 1, violations of Maryland antitrust law, Md. Code Ann. Com. Law. II §§ 11-204 et seq., and various state common law tort claims including malicious use of process, abuse of process, and fraud. The district court found that the defendants' actions were "deceitful," "underhanded," and "morally wrong." *Baltimore Scrap Corp.*, 81 F. Supp.2d at 603. Nevertheless, the district court dismissed Baltimore Scrap's claims because of the defendants' *Noerr-Pennington* immunity. *See id.* Baltimore Scrap now appeals.

II.

The *Noerr-Pennington* doctrine guarantees citizens their First Amendment right to petition the government for redress without fear of antitrust liability. *See Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-39 (1961); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669 (1965). In *Noerr*, the Supreme Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr*, 365 U.S. at 136. Indeed, the Court emphasized that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

Antitrust law was thus not intended to impose a barrier between the people and their government. Because it is "neither unusual or illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors," the Supreme Court has made clear that the Sherman Act generally does not prohibit the petitioning of public bodies for relief. *Id.* at 139. Indeed, an "anticompetitive purpose [does] not illegalize" concerted attempts to influence public officials "even though the resulting official action damaged other competitors at whom the conduct was aimed." *Pennington*, 381 U.S. at 669.

Noerr-Pennington immunity from antitrust laws extends to petitioning the courts as well. *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972). Federal antitrust law is thus generally not an appropriate means of collaterally attacking state judicial judgments because of *Noerr-Pennington*'s holding that the rights of petition and association trump any anticompetitive effects that might occur from asking the government for redress. Any other rule would allow the specter of satellite

litigation to restrict the primary right of citizens to seek justice from the judicial system.

III.

Noerr-Pennington immunity from lawsuits has two main exceptions, however — "sham litigation" and, arguably, fraudulent litigation. *See Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus.*, 508 U.S. 49, 60, 61-62 n.6 (1993) (*PRE*); *accord Noerr,* 365 U.S. at 144. Baltimore Scrap argues that both exceptions operate to strip the defendants of any *Noerr-Pennington* immunity.

A.

We address the sham exception to *Noerr-Pennington* immunity first. Sham litigation must meet a two-part test. *See PRE,* 508 U.S. at 60-61. First, the lawsuit must be objectively baseless. A lawsuit is objectively baseless only if "no reasonable litigant could realistically expect success on the merits." *PRE*, 508 U.S. at 60. If an objective party can "conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr,* and an antitrust claim premised on the sham exception must fail." *Id.* By definition, a winning lawsuit is a "reasonable effort at petitioning for redress and therefore not a sham." *Id.* at 60 n.5. Second, in the event the challenged litigation is found to be objectively baseless, the lawsuit must further conceal an attempt to interfere directly with the business relationships of a competitor. *Id.* at 60-61. Because the litigation at issue in this case was not objectively baseless, our analysis stops after the first prong of the test.

Lawsuits are not objectively baseless simply because a litigant lost. In *PRE,* the Supreme Court held that Columbia Pictures had a reasonable basis for believing it might win a copyright infringement case despite the fact that the Ninth Circuit dismissed the lawsuit as a matter of law. *See PRE,* 508 U.S. at 63-65. The Court pointed to the fact that two other circuits expressly declined to follow the Ninth Circuit's holding as well as the criticism that the Ninth Circuit's

opinion engendered among commentators. *See id.* Even in the absence of this contrary authority, the Court held that Columbia Pictures would have been entitled to press a novel claim if a similarly situated litigant could have perceived some likelihood of success. *See id.* at 65.

Baltimore Scrap argues that the litigation was a sham because the defendants knew that the citizen groups did not have standing and Sipes did not timely move to intervene. Baltimore Scrap cites *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), and *Landmarks Holding Co.* v. *Bermant*, 664 F.2d 891 (2d Cir. 1981), to support its claim. In *Burlington Northern*, railroad companies allegedly tried to prevent or delay the construction of a coal pipeline by engaging in sham petitioning of the courts. *See* 822 F.2d at 521. Some of the railroad companies knew that they had no standing or had no reasonable basis for asserting standing. Still, they joined in the lawsuit. *See id.* at 530. The court held that the defendants' actions were not protected by *Noerr-Pennington* because the litigation was baseless. *Id.* In *Landmarks Holding*, owners of a shopping mall sued a competing shopping mall knowing that they lacked the standing to do so. *See* 664 F.2d at 893. These owners also subsidized litigation by various citizens to stop the competing mall without the citizens' knowledge that the shopping mall owners were funding the lawsuit. *See id.* at 893-94. The court held that because all the lawsuits were meritless, *Noerr-Pennington* did not protect the defendants' actions. *See id.* at 896.

The case at bar differs substantially from both *Burlington Northern* and *Landmarks Holding*. First, both these cases were decided before the Supreme Court enunciated its test for sham litigation in *PRE*. Second, and more importantly, in both cases the defendants knew or reasonably should have known that they lacked standing and therefore that their claims were baseless.

In this case, an objective litigant could reasonably expect to achieve success on the merits. Although the zoning lawsuit

was eventually dismissed due to lack of standing, Judge Ward ruled for the citizen groups on the standing issue and allowed Sipes to intervene. Chief Judge Hammerman indicated that after his independent research, he probably would agree with Judge Ward if he needed to rule on standing. The Court of Special Appeals disagreed, but only after making a "logical extension" of its intervention rule and after a reasoned opinion. *Sipes,* 635 A.2d at 94. As the district court noted, the "success before two judges of the Circuit Court for Baltimore City demonstrates a reasonable basis" for the litigation position. 81 F. Supp.2d at 614. The fact that the Court of Special Appeals ultimately dismissed the lawsuit on the standing issue makes no difference in deciding whether an objective litigant could reasonably expect to have success on the merits. Judged by this latter standard, the zoning litigation was not a sham.

B.

Baltimore Scrap maintains, however, that *Noerr-Pennington* analysis is inapplicable to this case because DJJ and the Shapiro family did not petition the government since they were not parties to the zoning litigation. Baltimore Scrap argues that *Noerr-Pennington* protects litigants only, not third parties who covertly funded the lawsuit. *See PRE,* 508 U.S. at 60 ("If an objective *litigant* could conclude that the suit is reasonably calculated to elicit a favorable outcome . . . .") (emphasis added).

PRE is not so restrictive as to protect only the litigant from later antitrust liability. *See Liberty Lake Investments, Inc.* v. *Magnuson,* 12 F.3d 155, 157-59 (9th Cir. 1993). The fact that a third party funded the litigation cannot govern the analysis of the objective merit of a lawsuit. *See id.* As the Sixth Circuit put it, "[I]t would avail an antitrust plaintiff nothing to show that the defendant had surreptitiously caused a front man to institute a lawsuit against the plaintiff, even if the suit proved to be without merit, absent a showing of clear abuse of process." *Opdyke Investment Co.* v. *City of Detroit,* 883 F.2d 1265, 1273 (6th Cir. 1989).

Baltimore Scrap again relies on *Burlington Northern* for the proposition that a third party who does not have standing to pursue a lawsuit in its own right does not receive *Noerr-Pennington* immunity. *See Burlington Northern*, 822 F.2d at 531. In *Burlington Northern,* Union Pacific Railroad did not join the litigation against the coal pipeline company as a party. However, it provided legal assistance to the state of Nebraska. Most parties, as well as the district court, did not know of Union Pacific's involvement in the lawsuit. *See id.* at 530-31. The court held that if Union Pacific did not have standing against the pipeline company in its own right, it would not receive the protection of *Noerr-Pennington. See id.* at 531 and n.11.

Baltimore Scrap argues that since the defendants in this case likewise did not have standing to pursue the appeal, they do not receive *Noerr-Pennington* immunity. We are wary of relying on *Burlington Northern,* however, given the fact that the Supreme Court in *PRE* specifically disapproved of *Burlington Northern* in fashioning its two-part sham litigation test. *See PRE,* 508 U.S. at 55 n.3. Indeed, post-*PRE* cases with similar facts have recognized that the defendant's standing to bring a lawsuit is not germane in deciding whether the lawsuit itself was objectively meritless. *See, e.g., Liberty Lake*, 12 F.3d at 155. In *Liberty Lake*, a developer named Harry Magnuson solicited and financed straw parties to prosecute an environmental challenge against a competing business. *See Liberty Lake,* 12 F.3d at 158. The *Liberty Lake* court undertook the normal, two part analysis for sham litigation despite the fact that Magnuson was behind the litigation. *See id.* at 157-58. In a case decided before *PRE,* this circuit declined as well to deny *Noerr-Pennington* immunity to non-litigants. *See Hospital Building Co.* v. *Rex Hospital*, 691 F.2d 678 (4th Cir. 1982) (non-litigants who caused a government entity to file litigation entitled to jury charge of *Noerr-Pennington* immunity).

In this case, we need not decide whether the defendants themselves had independent standing to pursue the zoning litigation in state court because the standing of third parties

does not control the sham litigation analysis. Funding of litigation by a non-party can be petitioning to the same extent that filing a lawsuit itself is petitioning. *See Liberty Lake*, 12 F.3d at 157-59; *Opdyke*, 883 F.2d at 1273. Indeed, non-parties often provide aid to litigants, whether through financial backing, legal assistance, amicus briefs, or moral support. The fact that an amicus brief, for example, might be filed by a non-party with some anti-competitive aim does not strip from the amicus its *Noerr-Pennington* right to petition the courts. The realities often are that litigation cannot be entirely financed out of the pocket of the party bringing suit. And the costs of supporting a party's right of access to public bodies need not entail the defense of a collateral antitrust suit. To hold that only parties who have standing in their own right receive the protection of *Noerr-Pennington* immunity is to artificially restrict that doctrine by penalizing even the lawful support of objectively meritorious actions.

Such a limited rule would also severely curtail the rights of all citizens to petition the government and to associate with others who do so. The First Amendment freedoms of petitioning and of association protect groups who for whatever reason want to contribute to a lawsuit openly or to stand apart from public view while another party files a lawsuit, assuming no rule or statute independently requires disclosure of the aid. Accordingly, because the litigation was not objectively baseless, and because the source of funding this lawsuit in no way affected the legitimacy of the claims advanced, the district court correctly held that the lawsuit was not sham litigation. As that court noted, Baltimore Scrap has "fail[ed] to show how the legal questions raised by the citizens groups in the zoning appeal would have lacked objective merit had the role of the defendants been known." 81 F. Supp.2d at 615-16.

IV.

Baltimore Scrap argues in the alternative that even if the lawsuit was not sham litigation, the defendants' actions do

not deserve *Noerr-Pennington* immunity because of the fraud exception to *Noerr-Pennington*.

In *PRE*, the Supreme Court specifically left open the question of whether a fraud exception to *Noerr-Pennington* exists. "We need not decide here," the Court stated, "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *PRE*, 508 U.S. at 62 n.6. If a fraud exception to *Noerr-Pennington* does exist, it extends only to the type of fraud that deprives litigation of its legitimacy. See *Cheminor Drugs* v. *Ethyl Corp.*, 168 F.3d 119, 123-24 (3d Cir. 1999). ("While we do not condone misrepresentations in a judicial setting, neither will we deprive litigants of immunity derived from the First Amendment's right to petition the government if the alleged misrepresentations do not affect the core" of the litigant's case.); *Liberty Lake*, 12 F.3d at 158-59 *(PRE* "does not obviate application of the Court's two-part test for determining sham litigation in the absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy."). Alleged frauds that "do not infect the core" of a case will receive *Noerr Pennington* immunity because regardless of the alleged fraud, the outcome would have been the same. *Cheminor*, 168 F.3d at 123. If a judgment is not procured by fraud or deceit, it cannot fall within any fraud exception to *Noerr-Pennington*. *See PRE*, 508 U.S. at 61-62 n.6; *Liberty Lake*, 12 F.3d at 158-59. Because Baltimore Scrap cannot show that the state court judgment was procured by fraud or deceit, we need not reach the question of whether a fraud exception to *Noerr-Pennington* still exists after *PRE*.

Baltimore Scrap alleges three instances of fraud that deprive the litigation of legitimacy: 1) the defendants' clandestine funding of the citizen groups; 2) the misstatements that Irwin made to Chief Judge Hammerman at the April 23, 1993 hearing about the defendants' role in financing the lawsuits; and 3) the fabricated environmental

issues that the citizen groups supposedly raised in their pleadings. Like the district court, we in no way condone the actions of the defendants. Whether to condemn their activities, however, is a different question than whether to abrogate *Noerr-Pennington* immunity for conduct that does not deprive the lawsuit of legitimacy. In achieving an overall public benefit like the right to petition, any immunity will shield individual instances of conduct that might otherwise be actionable. None of the defendants' alleged frauds infected the core of the lawsuit's legitimacy.

Baltimore Scrap first argues that the defendants' failure to inform the citizen groups who was funding the lawsuit deprives the litigation of legitimacy. Specifically, Baltimore Scrap contends that if DJJ or the Shapiro family had revealed its involvement in the litigation, the citizen groups would not have accepted the funding and the lawsuit would have been dropped. Baltimore Scrap specifically points to the testimony of Gloria Sipes, who testified that had she known the defendants were behind the lawsuit, she would not have taken their money. Even if these allegations are true, they do not rise to the level of fraud on the courts. This alleged fraud was solely between the parties. The defendants' failure to tell the citizen groups that they were behind the litigation did not deceive the courts because the courts were not the target of this alleged deception. As the district court noted, Baltimore Scrap's "central problem, which it is unable to overcome, is that the arguments presented by the citizens groups were legitimate, both objectively and subjectively." 81 F. Supp.2d at 617.

The citizen groups can of course sue the defendants for fraud. Whether such an action by the citizen groups against the defendants for fraud would be successful is another matter. First, and most importantly, the citizen groups were not duped into pursuing a claim they did not want to litigate. In fact, the citizens' objections to Baltimore Scrap's metal shredder existed well before the defendants offered to pay for further litigation. Soon after the citizens learned of the proposed shredder, they voiced their opposition. They

attended a meeting with the Maryland Department of Environment on August 12, 1991 to protest the shredder. They wrote a letter to the mayor of Baltimore on August 26 urging him to block its installation. The citizens were extremely worried about the environmental damage that the shredder could cause, especially the increase in air pollution, the release of potentially toxic chemicals, and the potential of higher cancer rates.

Indeed, the citizen groups knew that "local businesses" were paying for the litigation. Despite knowing this fact, they decided to take the money because, as Sipes testified, they "[did] not care" who funded the lawsuit. Moreover, the defendants revealed their involvement to the citizen groups on April 3, 1993. After learning that the defendants were funding the litigation, the citizen groups nevertheless decided to continue their appeal. In sum, the evidence concerning the defendants' secret funding of the lawsuit, construed in the light most favorable to Baltimore Scrap, fails to rise to the level of fraud among the parties. It falls far short of showing the type of fraud upon the court that would deprive the litigation of its legitimacy.

Second, Baltimore Scrap contends that Irwin's alleged misrepresentations to the court about the role of the defendants in the lawsuit constitutes fraud that deprives the litigation of legitimacy. For purposes of summary judgment, we of course assume all facts in the light most favorable to Baltimore Scrap. The problem with Baltimore Scrap's argument remains, however, that Irwin's alleged misstatements were simply not material. Chief Judge Hammerman, before he ruled, stated that he saw the hand of the defendants in the lawsuit. Indeed, he presumed the defendants were involved before he issued his opinion against the citizen groups and the defendants. The result would have been the same even if Irwin had admitted the defendants' role because no judicial ruling was based on the erroneous assumption that the citizens alone were pursuing the appeal and fully funding the litigation.

If Irwin did indeed misrepresent facts to the court, the proper remedy here is through Maryland law, whether it be through the sanctioning process of the state bar, *see, e.g.*, Md. R. Prof. Conduct 3.3 ("A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."), Md. R. Prof. Conduct 8.4 ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation [or] engage in conduct that i[s] prejudicial to the administration of justice."), Md. R. 16-812 (adopting the Maryland Rules of Professional Conduct), *Attorney Grievance Comm'n of Maryland* v. *Middleton*, 756 A.2d 565, 573-74 (Md. App. 2000) (upholding state bar's indefinite suspension of a lawyer because of intentional misrepresentations to a court since "candor and truthfulness are two of the most important moral character traits of a lawyer") (internal quotations omitted); the state Rules of Civil Procedure, *see* Md. R. 1-311 (stating that the effect of a lawyer's signature on the pleadings is to represent "that to the best of the attorney's knowledge, information, and belief there is good ground to support" what was written, and imposing potential disciplinary action for "a wilful violation of this Rule"), Md. R. 1-341 (awarding attorney's fees if "the conduct of any party in maintaining or defending any proceeding was in bad faith . . ."), Md. R. 2-535 (allowing court to revise the judgment "in case of fraud, mistake, or irregularity"), Md. Code Ann. Cts. & Jud. Proc. § 6-408 (1998) (same); or another similar process. The states are perfectly capable of handling malfeasance in their own courts. Federal antitrust law is simply not the proper vehicle to punish an attorney's misconduct in state court.

Baltimore Scrap finally charges that the defendants fabricated environmental issues that caused the litigation to be deprived of legitimacy. Even if true, however, the lawsuit was not decided on environmental grounds. Rather, the lawsuit revolved around the issues of standing and intervention. In no way did the so-called environmental fabrications infect the core of the litigation's legitimacy.

We reiterate that the Supreme Court has not approved a fraud exception to *Noerr-Pennington* immunity at all. *See PRE*, 508 U.S. at 61-62 n.6; *Cheminor*, 168 F.3d at 123-24. Yet the fraud exception as Baltimore Scrap conceives it would have wide ranging implications for our federal system as well as the *Noerr-Pennington* doctrine. A broad fraud exception would allow federal collateral litigation over conduct in state courts that never affected the core of a state judgment. It is simply not the role of federal courts hearing antitrust lawsuits to reconsider the underlying validity of a state zoning contest. We would have to immerse ourselves in the minutiae of state civil proceedings and in effect relitigate the claims that the state courts have already decided. For the federal courts to entertain this type of antitrust action would impermissibly impact the right to petition a coordinate system of justice. Such concerns weigh heavily against creating any broad exception to the immunity created by *Noerr* and its numerous progeny.

V.

The replay of state law zoning disputes is not normally the proper function of antitrust litigation, especially when the alleged fraud did not deprive the litigation of its underlying legitimacy and when the lawsuit is not objectively meritless. We hold as a matter of law that the defendants' actions do not warrant the dissolution of *Noerr-Pennington* immunity. For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BALTIMORE SCRAP CORP.	:	
	:	
v.	:	CIVIL NO. L-96-827
	:	
THE DAVID J. JOSEPH CO., et al.	:	

MEMORANDUM

This is an antitrust suit. Before this Court are the defendants' motions for summary judgment. Because the parties have extensively briefed the issues, the Court will dispense with a hearing. *See* Local Rule 105.6 (D. Md. 1999). For the reasons stated herein, the Court will, by separate Order, grant the defendants' motions and close the case.

I. Introduction

Because of the complexity of the facts, a brief introduction may be useful. In 1991, the plaintiff, the Baltimore Scrap Company, ("Baltimore Scrap" or "BSC"),[1] proposed installing a new scrap metal shredder in the Fairfield section of Baltimore City. The proposal required zoning approval from the City. A coalition of citizens groups openly opposed the shredder on environmental grounds. The defendants,[2]

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[1] During the events giving rise to this lawsuit BSC was known as Brooklyn Salvage Corporation. For the sake of clarity, the parties have used "Baltimore Scrap" to refer to both the present corporation and its predecessor, a practice the Court will adopt.

[2] There are two sets of defendants in this case, all of whom are past or present owners of the existing shredder. The relationship

who owned an existing shredder and did not welcome the competition, secretly set about to thwart BSC's zoning application.

After initially rejecting it, the Board of Municipal Zoning Appeals (BMZA) approved Baltimore Scrap's application on August 6, 1992. The defendants had standing to appeal the BMZA's decision to the Circuit Court for Baltimore City. The defendants were concerned, however, that an appeal in their name, a competitor with a spotty environmental track record, would lack credibility.[3] The defendants decided that bankrolling an appeal by a citizens group, while masking their own involvement, presented a better strategy.

To carry out their plans, the defendants contacted an attorney and offered to pay him if he were, in turn, approached by the citizens groups. An employee of one of the defendants' subsidiaries (Marlen Trading Company), posing as a "concerned local business," approached the citizens groups, offering that if the citizens wished to pursue an appeal of the BMZA decision, Marlen would pay their legal costs, including attorneys' fees. The employee also steered the citizens to the attorney whom the defendants had already contacted. The citizens groups accepted the offer. Neither Marlen nor the attorney told the citizens that the defendants, rather than an environmentally concerned local business, were behind the appeal.

Over the next seven months, the defendants were actively, albeit clandestinely, involved in the citizens' appeal. The defendants paid the bills, reviewed the pleadings, and suggested strategies. Eventually, however, the defendants' involvement in the zoning litigation came to light through what the parties refer to as the "errant fax."

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among the various defendants and their involvement with this case are explained later in this Memorandum.

[3] The defendants anticipated that part of the appeal would raise environmental issues.

Ultimately, Baltimore Scrap's application was successful and its shredder was built. BSC argues, however, that the appeal delayed the installation of the shredder by approximately eighteen months. Claiming fraud and violation of the antitrust laws, the plaintiff filed the instant suit.

The Court finds the defendants' actions deceitful and underhanded. This is a conclusion reached not only by this Court, but also by the defendants' own antitrust attorney. Concerned that their secret role in the zoning appeal might expose them to antitrust liability, the defendants consulted Richard Wertheimer, a partner at the Washington, DC law firm of Arnold & Porter. Wertheimer advised the defendants that their actions, while probably not illegal, were unworthy of a respectable business.

Although morally wrong, the defendants' disguised role in the zoning appeal was not illegal. Under the *Noerr-Pennington* doctrine, a company may, even secretly and for anticompetitive purposes, sponsor a lawsuit against a competitor, so long as the lawsuit is neither a sham, meaning that it is not objectively baseless, nor fraudulent.

The appeal was not sham litigation. Although ultimately unsuccessful, the citizens' appeal raised bona fide legal issues, including (i) whether the citizens had standing to appeal, and (ii) whether the BMZA had used the appropriate legal standard in authorizing a zoning permit for the new shredder.

Nor do the defendants' actions add up to fraud. The errant fax unmasked the defendants' involvement in the litigation before the Circuit Court for Baltimore City had issued its final decision. Baltimore Scrap has not shown that the litigation would have been shorter had the courts known from the outset that the defendants were clandestinely financing and advising the appeal. Nor is there evidence that any judicial rulings were predicated upon the misassumption that the citizens, and the citizens alone, were pressing the appeal.

This Opinion is not meant to condone the defendants' tactics. The Court agrees with Attorney Wertheimer that the defendants' actions were unworthy of a legitimate business. At the same time, however, the Court finds that the defendants' actions fell short of violating the antitrust laws.

II. Factual Background

A. Litigation Timeline

The following summarizes the major events in the history of the zoning litigation:

July 1991:	Baltimore Scrap Company leased Carbon Avenue junk yard site.
November 25, 1991:	BMZA rejected BSC's application for a construction permit. Vote was 3-1 in favor of issuing the permit, but four votes were required for approval.
August 6, 1992:	BMZA approved BSC's second application for a construction permit. The Board found the second application substantially different from the first. The language of the Board's decision appeared to classify the proposed shredder as a material recovery facility (MIRF). Such a classification would be incorrect, because a MIRF: (i) is not authorized to accept certain types of metal which the shredder was to process, and (ii) must be contained in an enclosed facility.
August 27, 1992:	Citizens groups, represented by David Irwin, filed an appeal of the BMZA's decision in the Circuit Court for Baltimore City.

October 13, 1992: Gloria Sipes moved to intervene as a plaintiff in the zoning appeal. Shortly thereafter, BSC moved to dismiss the zoning appeal, arguing the citizens groups lacked standing and Sipes's Motion to Intervene was time-barred.

December 7, 1992: Hearing on procedural motions held before Judge Thomas Ward. Judge Ward granted Ms. Sipes's Motion to Intervene and denied BSC's Motion to Dismiss.

January 7, 1993: Hearing on the merits of the zoning appeal held before Chief Judge Robert I.H. Hammerman. Chief Judge Hammerman approved of Judge Ward's procedural rulings. He further ruled that substantial evidence supported the Board's conclusion that the 1992 application was substantially different from the first. He remanded the case to the BMZA, however, so that the Board could explain why it had classified the shredder as a MIRF.

February 25, 1993: Hearing before Chief Judge Hammerman on Baltimore Scrap's motion to alter or amend judgment. BSC produced the Gadhia affidavit. The affidavit stated that: (i) the Board's reference to the MIRF provisions was unintentional; and (ii) the BMZA made a clerical error in classifying the proposed shredder as a MIRF. According to Gadhia, the shredder should have been considered a structural alteration to a

junk yard conditional use. With this correction, the BMZA's decision was now internally consistent and correct, Gadhia explained.

March 1, 1993: Chief Judge Hammerman accepted the Gadhia affidavit even though it was not part of the administrative record, and was written after the record had been transmitted to the Circuit Court for Baltimore City.

Chief Judge Hammerman decided that the Gadhia affidavit cured the inconsistencies in the BMZA decision. Accordingly, he granted BSC's motion to alter or amend judgment by (i) not remanding the case to the BMZA, and (ii) affirming the BMZA's decision.

March 24, 1993: The involvement of the defendants was first exposed with the transmission of the errant fax.

March 25, 1993: The citizens groups moved to stay enforcement of Chief Judge Hammerman's ruling pending appeal to Court of Special Appeals.

April 3, 1993: Irwin met with leaders of the citizens groups and revealed the identity of their benefactors. After discussion, the citizens groups decided to continue with the appeal.

April 23, 1993: Chief Judge Hammerman denied the citizens groups' Motion to Stay Enforcement, and stated he perceived the hand of United Holdings in the appeal.

January 7, 1994: Court of Special Appeals remanded the case with instructions to dismiss the appeal, holding the citizens groups lacked standing and Sipes's intervention was time-barred.

B. The Metal Shredding Industry

Shredding companies buy scrap metal, shred the metal, and sell the processed scrap to steel mills, foundries, and scrap metal brokers. Eventually, the shredded scrap is melted down and reprocessed. Shredders operate on a narrow profit margin, representing the difference between the price they must pay for scrap (e.g. junked cars and dishwashers) and the price they receive from mills and brokers. Competition from another shredder squeezes the profit margin by driving up the scrap metal price and driving down the price of processed scrap.

Prior to the events giving rise to this lawsuit, the United Iron & Metal Company operated at 2545 Wilkens Avenue in southwest Baltimore the only shredder in the metropolitan area. Before 1990, the United shredder was owned by the defendants referred to during this litigation as the "Shapiro defendants."[4]

In September, 1990, the David J. Joseph Company ("DJJ") bought the United Iron & Metal shredder from the Shapiro defendants. DJJ, which is based in Cincinnati, Ohio, is the

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[4] The Shapiro defendants are: I.D. Shapiro; James Shapiro; Charles Baum; United Holdings Co., Inc. (a successor to United Iron & Metal); United Operating Co., Inc.; and United Investment Enterprises Partnership. The plaintiff's complaint focuses on the actions on [sic] I.D. Shapiro. Based upon papers presented to the Court, James Shapiro and Charles Baum played minor roles in the events giving rise to this lawsuit. Because judgment is being entered in favor of all the Shapiro defendants, the Court has not been called upon to determine whether James Shapiro and Charles Baum are more than nominal defendants.

largest metal recycler in the United States.[5] The deal was structured so that the Shapiro defendants retained a financial interest in the Wilkens Avenue operation.

Metal recycling and shredding can create significant environmental problems. Cars and refrigerators contain many other materials besides valuable steel scrap. Freon, upholstery, plastics, and a host of other "contaminants" must be removed either before or during shredding. In such a low margin business, shredders have an economic disincentive to spend money controlling and containing the non-salable by-products. Over the years, community and environmental groups lodged repeated complaints about excessive noise and pollution coming from the United Iron & Steel's Wilkens Avenue plant. *See, e.g.,* Plaintiff's Exh. 26.

David Simon, the president of Baltimore Scrap, operated a recycling business in Pennsylvania. Seeking to expand, Simon sought to open a shredder in New York State. In the face of community opposition, however, his permit was denied. Having already purchased the shredding machine intended for installation in New York, Baltimore Scrap looked for an alternative location.

In July 1991, Baltimore Scrap leased a junk yard located at 1600 Carbon Avenue in Baltimore. The owner, Mr. Frank Gambel, had installed and operated two shearers, which were a more primitive type of metal recycling machinery. After leasing 1600 Carbon Avenue, Baltimore Scrap closed down the shearers and began cleaning the lot in preparation for the new shredder.

Prior to Baltimore Scrap's public announcement, DJJ received word of the new potential competitor. On July 18, 1991, DJJ's Baltimore manager, David Workum, sent a memo to DJJ executive James Breth. *See* Plaintiff's Exh. 12.

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[5] The amended complaint named as additional defendants the David J. Joseph Co. ("DJJ") and the manager of its Baltimore facility, David J. Workum, III.

Workum wrote that he had heard "in the past three to six months" that BSC was planning to install a shredder. DJJ began working behind the scenes to block BSC:

> Through connections of I.D. Shapiro and Warren Rich, we are trying to block Brooklyn's move to install a shredder. . . . Warren Rich is attempting to find any EPA problems Simon may have had [elsewhere], again to discredit his permitting attempt. Warren is handling all this so as to keep DJJ and United's name out of the picture.[6]

Id.

Prior to any zoning application being filed, DJJ (i) knew Baltimore Scrap intended to become a competitor in the Baltimore scrap market, (ii) was seeking ways to prevent that from happening, and (iii) realized that it would be unwise for a shredder company with its own environmental problems publicly to oppose Baltimore Scrap's application.

C. The 1991 Zoning Hearing

In September 1991, Baltimore Scrap filed an application with the Baltimore zoning administrator for a permit to install the new shredder at the Carbon Avenue site. *See* DJJ Defendants' [hereinafter "DJJ"] Exh. Al. Because BSC's application called for structural alterations to a conditional use, the application, under Baltimore zoning regulations, was automatically appealed to the Baltimore Board of Municipal and Zoning Appeals ("BMZA"). The appeal was apparently *de novo*, meaning that the BMZA could consider testimony and decide issues of fact.

DJJ continued to investigate ways to prevent Baltimore Scrap's entry into the scrap metal market. Two attorneys working for DJJ, Warren Rich and Timothy Henderson, contacted the Maryland Department of the Environment to

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[6] Warren Rich was an attorney representing DJJ. At the time he was affiliated with the firm of Graham and James.

determine if BSC had ever been the subject of any environmental investigations. *See* Plaintiff's Exh. 24. As early as July 1991, I.D. Shapiro and his attorney, Isaac Neuberger,[7] contacted several city officials and political figures to voice their objections to Baltimore Scrap's application. *See* Plaintiff's Exh. 1 at 38-41; Second Dep. of I.D. Shapiro at 570-72, 580-82.[8]

Concerned about the antitrust implications of these activities, DJJ, on November 6, 1991, consulted Richard J. Wertheimer of Arnold & Porter. Wertheimer advised DJJ Vice President Stephen Wulff that legitimate petitioning of the government was protected by the *Noerr-Pennington* doctrine, but lying or deceit was not. Dep. of Stephen Wulff at 90-94.

Through Attorney Timothy Henderson, DJJ, on November 19, 1991, submitted to the Baltimore Department of Planning and Zoning a study of the Baltimore scrap market. The report, prepared by DJJ, inferred that the new shredder was not needed because the shredding capacity of the Baltimore market exceeded the demand.[9] *See* DJJ's Exh. D12.

On the same day, the BMZA held its hearing on Baltimore Scrap's application. A number of individual citizens and

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[7] Neuberger's law firm, Neuberger, Quinn, Gielen, Rubin & Gibber, P.A., is called "The Neuberger Firm" by parties, and will be so called by the Court.

[8] DJJ officials were aware of Shapiro's efforts. *See* Plaintiff's Exh. 21.

[9] BSC contends the conclusions reached in the Henderson report are false. BSC claims the defendants underestimated the amount of scrap available in the Baltimore area by assuming that No. 2 steel, including white goods, automobile bumpers, and portions of automobile fenders, cannot be shredded. *See* Aff. of David M. Simon, Plaintiff's Exh. 3. The defendants, on the other hand, assert they used standard industry assumptions in making their estimates. This dispute is not material, because there is no evidence that the zoning authorities gave any consideration to the Henderson report. *See* Part III.B.3.c, *infra*.

citizens groups appeared to testify against the application. Many of the witnesses cited environmental objections. *See* Plaintiff's Exh. 4. On November 25, 1991, the BMZA voted 3-1 in favor of the zoning variance. Because four votes were required for approval, the application was denied.[10] The member casting the opposing vote cited environmental reservations. *See* BMZA Resolution, DJJ Exh. A5.

D. The 1992 Zoning Hearing and Initial Appeal

In the summer of 1992, Baltimore Scrap again sought approval from the zoning board for a construction permit.[11] Under Baltimore City zoning law, a zoning application disapproved by the BMZA cannot be considered again by the Board for one year. The one-year waiting period does not apply if the application is "substantially" different from the one previously rejected. In this case, BSC argued that the 1992 application was substantially different because it proposed to protect groundwater by paving the site with concrete and installing an oil/water separator. The BMZA accepted BSC's argument and considered the second application before the one-year waiting period had expired. *See* DJJ Exh. B6.

Many of the same citizens groups that had opposed the 1991 application again appeared before the Board. This time, however, the BMZA was apparently convinced that the proposal had sufficient environmental safeguards. On August 6, 1992, Baltimore Scrap prevailed: the BMZA issued a written decision granting the construction permit. *See* DJJ Exh. B8. In the text of its decision, however, the BMZA erroneously referred to the shredder as a material recovery facility ("MIRF"). As will be seen, this clerical error was to cause problems for the BMZA and Baltimore

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[10] One of the five BMZA members was absent, meaning that a unanimous vote in favor of Baltimore Scrap would have been required.

[11] As in 1991, the decision of the zoning administrator was automatically transmitted to the BMZA for review.

Scrap, because a MIRF is not authorized to accept certain varieties of ferrous metals which the shredder was intended to process. In addition, a MIRF must be contained in an enclosed facility, which the proposed shredder was not.[12]

I.D. Shapiro discussed with his Attorneys, Rich and Neuberger, the option of filing an appeal in United Holdings's name. *See* Plaintiff's Exh. 1 at 16. As a taxpayer, United Holdings would have enjoyed standing to appeal the BMZA's decision to the Circuit Court for Baltimore City. The group was concerned, however, that an appeal by a competitor, especially one with a spotty environmental track record, would lack credibility.

Instead, the group struck upon the idea of funding an appeal by the citizens. At the defendants' behest, an official of the Marlen Trading Company[13] approached Gloria Sipes, the president of the Community of Curtis Bay Association ("CCBA"). The defendants chose Ms. Sipes because she had spoken in opposition to Baltimore Scrap's application. The Marlen official told Sipes that "local businesses" wanted to fund an appeal, and that if interested she should contact attorney David Irwin. On August 24, 1992, Ms. Sipes called Irwin. *See* Dep. of David Irwin at 25. Isaac Neuberger had already spoken with Irwin, promising that he would be compensated if he represented the citizens groups. *See id.* at 27-28.

The defendants devised a roundabout scheme to handle payments to Irwin. Irwin submitted bills to CCBA. *See, e.g.*, Plaintiff's Exh. 14. Sipes transmitted the bills to Marlen Trading, which wrote checks to CCBA. Sipes, in turn, endorsed the checks to Irwin's firm. DJJ later reimbursed

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[12] As stated in Part II.E *infra*, the Board did not intend to classify the shredder as a MIRF. As explained in the Gadhia affidavit, the Board's decision mistakenly quoted provisions of the zoning code relating to a MIRF.

[13] I.D. Shapiro owned a "substantial interest" in Marlen Trading. *See* DJJ Mem. Supp. Summ. J. at 18.

Marlen Trading for its outlays. *See* Plaintiff's Exhs. 15 & 16.

On August 27, 1992, Irwin filed an appeal on behalf of the citizens groups in the Circuit Court for Baltimore City. The named appellants were three citizens groups: Community of Curtis Bay Association Inc., Concerned Citizens for a Better Brooklyn, Inc., and Maryland Waste Coalition. The names of Shapiro, DJJ, and United Iron & Metal did not appear on the court papers. *See* DJJ Exh. C1.

The appeal asserted three grounds for reconsideration of the zoning board's decision: (i) that Baltimore Scrap's second application was not substantially different from its first application; (ii) that the zoning board had improperly classified Baltimore Scrap's facility as a "MIRF" (material recovery facility), whereas in fact a MIRF is not authorized to accept certain ferrous metals the shredder would be processing; and (iii) if the facility were properly classified as a MIRF, then the Board's decision was also erroneous because it misquoted and misconstrued provisions of the zoning code pertaining to enclosure requirements of a MIRF. On October 13, 1992, Irwin moved to add Gloria Sipes as a plaintiff.

Baltimore Scrap filed two procedural objections to the appeal. It opposed Ms. Sipes's Motion to Intervene as time-barred, and it moved to dismiss the appeal on the grounds that the citizens groups lacked standing because they were neither taxpayers nor "aggrieved persons". *See* BSC Motion to Dismiss or In the Alternative, for Summary Judgment, DJJ Exh. C10. The procedural motions were assigned to Judge Thomas Ward, an Associate Judge of the Circuit Court for Baltimore City, who held a hearing on December 7, 1992.[14] Judge Ward granted the Motion to Intervene (adding Gloria

[14] Unfortunately, there is no transcript of the December 7 hearing because of a mechanical problem with the court reporter's recorder.

Sipes as a plaintiff), and denied Baltimore Scrap's Motion to Dismiss. *See* DJJ Exh. C16.

The zoning case on its merits was assigned to Chief Judge Robert I.H. Hammerman of the Circuit Court for Baltimore City. During a hearing on January 7, 1993, Chief Judge Hammerman commented upon and approved Judge Ward's earlier procedural ruling. He stated: "[W]ithout having heard oral argument, if I were to have made the decision last night after all my research on this and reading the authorities, I would have decided the same way." Transcript of Hearing, DJJ Exh. C19 at 5.

During the hearing, Chief Judge Hammerman also ruled that substantial evidence supported the BMZA's determination that the second application was substantially different from the first. At the same time, however, he observed that he might have ruled differently had the standard of review offered him more latitude: "I'm not saying that if I were to decide it totally unencumbered, so to speak, that I would find the same way as the Board."[15] *Id.* at 27.

Chief Judge Hammerman nevertheless remanded the case to the BMZA for reconsideration of the plaintiffs' second and third arguments: to wit, that the Board had misclassified the application as a MIRF, and that the proposed facility would not meet the requirements of a MIRF. Addressing Baltimore Scrap's arguments that the classification was simply a clerical error, Chief Judge Hammerman stated:

> I am not prepared to say this was a slip of the pen, a slip of the tongue . . . . There are several places on page two, and even on page three, which would clearly indicate that the Board is looking upon this as a materials recovery

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[15] On appeal to the Circuit Court, a zoning board's decision must be upheld if supported by substantial evidence. *See, e.g., Aaron* v. *City of Baltimore*, 207 Md. 401, 406, 114 A.2d 639 (1955).

> facility . . . . So I just cannot share the argument or the characterization by the Appellees that this means nothing, this language, [is] simply to be totally ignored.

Id. at 28.

Both the DJJ and Shapiro defendants were closely involved with the citizens' appeal. I.D. Shapiro paid Irwin's legal fees via Marlen Trading Company. Isaac Neuberger and I.D. Shapiro communicated with Irwin concerning strategies for the case. *See* Plaintiff's Exhs. 13 & 47. Thomas "Sam" Wood, a member of the Neuberger firm, forwarded copies of the pleadings to I.D. Shapiro, noting that Irwin "is representing our interest." Plaintiff's Exh. 30. Irwin admits he sent "most, if not all" of his pleading drafts to Wood, and that the Neuberger firm was a "resource in this case." Dep. of David Irwin at 35. In contrast, Mr. Irwin did not submit these drafts to Ms. Sipes or the citizens groups for prior approval. *See id.*

At the same time, both the DJJ and Shapiro defendants continued to mask their involvement.[16] Their names never appeared on the papers. The citizens groups were not told who (beyond Marlen Trading Company) was funding their appeal.[17] *See, e.g.*, Deps. of Gloria Sipes at 213, Doris

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[16] The plaintiff argues that the defendants concealed their identity, in part, because had the citizens groups known a competing shredder company, with environmental problems of its own, was funding the appeal they would not have accepted the assistance. *See, e.g.*, Dep. of Gloria Sipes at 142, 213. During discovery in the instant case, Ms. Sipes and others were questioned as to what their reaction would have been had they known of the Shapiro defendants' role. The citizens' reactions were mixed. All said they would have been upset. Some testified that they would probably have accepted the money. Others testified that in retrospect they would have rejected the funding, even though without Marlen's financial support, the appeal would not have been possible. *See infra* Part III.B.3.a.

[17] Defendants point out that I.D. Shapiro's interest in Marlen Trading is on file with the Maryland Department of Assessments and Taxation and is therefore a matter of public record. While

McGuigan at 25, Delores Barnes at 43. Neither Gloria Sipes nor the citizens groups were told that I.D. Shapiro and his personal attorneys were vetting the pleadings and suggesting strategies.

The plaintiffs did, however, have hints that the defendants were involved in the zoning appeal. On August 25, 1992, Colleen Darden, a BSC employee, received a call from a person identifying himself as William Thomas.[18] Thomas said that "United Iron & Metal gave the people who were fighting us a very large sum of money. . . ." DJJ Exh. D37. Darden forwarded the message to David Simon. *See* February 18, 1998 Dep. of David Simon at 426.

E. Reconsideration of Chief Judge Hammerman's Ruling and Court of Special Appeals Decision

Baltimore Scrap requested Chief Judge Hammerman to reconsider his decision to remand the case to the BMZA.[19] In support of its motions, BSC submitted an affidavit it had obtained from BMZA chairman Lalit Gadhia ("the Gadhia affidavit"). DJJ Exh. C26. Gadhia stated that the Board's August 6, 1992 decision had mistakenly cited provisions of the zoning code relating to a material recovery facility (MIRF). The decision should have instead referred to a structural alteration to a junk yard conditional use.[20]

Defendants are correct, a technical corporate filing hardly amounts to disclosure to a citizen group.

[18] The true identity or affiliation of "William Thomas" remains unknown.

[19] On or about January 18, 1993, Baltimore Scrap filed Motions for a New Trial, to Alter or Amend Judgment, and to Revise Judgment. *See* DJJ Exh. C20.

[20] A material recovery facility (MIRF) is not authorized to accept certain varieties of ferrous metals which BSC was to process. It must also be completely enclosed. The citizens groups argued that by approving the BSC shredder as a MIRF, the Board had applied an incorrect statutory standard. By explaining the

On February 25, 1993, Chief Judge Hammerman held a hearing on Baltimore Scrap's motions. Benjamin Rosenberg, counsel for Baltimore Scrap, conceded that the BMZA's decision was confusing, but stated that the confusion was cleared up by the Gadhia affidavit. Rosenberg argued: "The Court's confusion and our confusion was perfectly understandable in light of the way this decision was written. We now know unmistakably and indisputably that that was a mistake." Transcript of hearing, DJJ Exh. C27 at 23.

Over Irwin's objections, Chief Judge Hammerman accepted Gadhia's affidavit and found it persuasive proof that the Board did not intend to classify BSC's shredder as a MIRF. Rather, the MIRF classification was a clerical error. The BMZA intended instead to approve the application as a structural alteration to a junk yard conditional use, which was authorized under Baltimore zoning code to accept a full range of ferrous metals.[21] Chief Judge Hammerman granted BSC's Motion and affirmed the BMZA decision of August 6, 1992. This meant BSC's permit would issue.

The defendants' covert involvement during the appeal continued. I.D. Shapiro met with DJJ President Louis Terhar on February 23, 1993 and asked Terhar to reimburse him for the legal expenses he had incurred in fighting BSC's zoning application. Shapiro boasted he had "saved him [Terhar] so far by full-time maneuvering two years." Dep. of I.D. Shapiro at 515-16. On March 1, Terhar agreed to fund further appeals. Dep. of Louis Terhar at 6-11.

The defendants' cloak of secrecy began to unravel on March 24, 1993. David Workum intended to fax to Attorney

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references to a MIRF as a mistake, the Gadhia affidavit made the Board's decision internally consistent.

[21] Although the parties disagreed over the meaning of the term "structural alteration to a junk yard conditional use," Chief Judge Hammerman stated that the affidavit proved the "Board was approving the application for the uses requested." DJJ Exh. C27 at 27.

Warren Rich a copy of a draft motion to stay Chief Judge Hammerman's ruling. Instead, the fax was mistakenly sent to a third party, Harry Lenick, a Pittsburgh scrap dealer.[22] Workum had obtained the draft from the Neuberger Firm, which had in turn received it from Irwin. Upon receiving the "errant fax," Lenick forwarded it to Baltimore Scrap's President David Simon.

The following day, March 25, Irwin, on behalf of the citizens groups, moved to stay enforcement of Chief Judge Hammerman's judgment pending appeal to the Maryland Court of Special Appeals. *See* DJJ Exh. 29. In its opposition memorandum, Baltimore Scrap drew the Court's attention to the errant fax, arguing that the citizens groups were only acting as "surrogates" for the real parties in interest, United Holdings and persons associated with United. Baltimore Scrap also demanded the citizens groups post a supersedeas bond pending the appeal.

In a reply brief filed April 16, 1993, Irwin, arguing for the citizens groups, stated, "United is not, openly or 'under the table,' the real party in interest in this case, and has in no way 'enlisted Appellants to serve as United's stalking horse to prosecute the appeal' of the Board's decision." DJJ Exh. C37 (quoting BSC opp. mem.). Irwin further argued that a bond was inappropriate, in part because the citizens groups and Ms. Sipes lacked sufficient funds to obtain one. *Id.*

Around the same time, in late March, Wulff again consulted with attorney Richard Wertheimer of Arnold & Porter. After discussions with both Wulff and Wood, Wertheimer advised Wood that Irwin had an ethical obligation to disclose to Ms. Sipes and the citizens groups the source of the financial support for their appeal.

On April 3, Irwin met with leaders of the citizens groups and revealed the involvement of United Holdings, I.D.

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[22] This transaction has come to be known in the litigation as the "errant fax."

Shapiro, and Marlen Trading in funding the appeal. At least some of the groups' leaders were "upset" and "disappointed" about the identity of their benefactor, but, after a lengthy discussion, they decided to press on with their appeal. *See* Deps. of David Irwin at 411-27, Gloria Sipes at 120-21, 248, Mary Rosso at 60.

On April 23, 1993, Chief Judge Hammerman held a hearing on the citizens groups' motion to stay enforcement. Chief Judge Hammerman questioned Irwin concerning the involvement of the defendants:

CHIEF JUDGE HAMMERMAN: Mr. Irwin --

MR. IRWIN: Yes, sir.

CHIEF JUDGE HAMMERMAN: You state, with respect to the [s]talking horse matter, that the only people you represent are the good people sitting here who are neighbors and residents.

MR. IRWIN: That is absolutely correct.

* * *

CHIEF JUDGE HAMMERMAN: How do you explain the affidavit [of Mr. Lenick] and how do you explain that Exhibit A [the errant fax]?

MR. IRWIN: I don't believe I have to explain it, Your Honor, in the sense that my law firm hasn't been sending anything -- I mean, there is nothing in this affidavit that says my law firm is involved with United in any --

DJJ Exh. 38 at 28-29.

Chief Judge Hammerman denied the motion to stay, stating that there was no likelihood the citizens would succeed on appeal. Chief Judge Hammerman also noted that, despite Irwin's disclaimers, he perceived the "hand of United Holding Company" in the appeal:

> I am suggesting . . . that it is clear to me that United has an interest in the outcome of this case and has carried that interest beyond simply standing on the sidelines as an interested observer but has participated in the legal effort to prevent Brooklyn Salvage from achieving their goal. I think they have gone from the role of an interested observer to the role of an active participant.

DJJ Exh. C38 at 34.

Although their motion to stay had been denied, the citizens groups pressed on with their appeal to the Court of Special Appeals.[23] The citizens groups urged the Court of Special Appeals to reverse because the Circuit Court had committed the following errors: (i) considering Gadhia's affidavit, which was not part of the agency record; (ii) giving weight to Gadhia's affidavit even though the affidavit contradicted a unanimous resolution of the BMZA; (iii) affirming the BMZA's decision even though the resolution cited inapplicable provisions of law; and (iv) determining that the BMZA's revised decision was supported by substantial evidence. *See Sipes* v. *Board of Municipal and Zoning Appeals*, 99 Md. App. 78, 81, 635 A.2d 86 (Md. Ct. Spec. App. 1994).

On January 7, 1994, the Court of Special Appeals issued an opinion and order which remanded the case with instructions to dismiss the appeal. The Court held that the citizens groups lacked standing because they were neither taxpayers nor "aggrieved" parties. Gloria Sipes as an individual and a taxpayer did have standing, but her motion to intervene was time-barred. The Court of Special Appeals stated the case was thus, "dead on arrival in circuit court." *Sipes,* 99 Md. App. at 99. The citizens groups did not petition for certiorari

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[23] During the summer of 1993, Irwin and I.D. Shapiro communicated directly about Irwin's legal fees for the appeal. *See* Plaintiff's Exh. 31. It is unclear from the record whether the Marlen Trading reimbursement scheme continued during this period.

to the Maryland Court of Appeals. Zoning in hand, Baltimore Scrap built the new shredder.

F. Filing of the Lawsuit

Baltimore Scrap filed the instant suit on March 19, 1996. Discovery was complicated because so many lawyers and law firms were witnesses. With the approval of both sides, the Court appointed a special discovery master, Rignal W. Baldwin, Jr. Mr. Baldwin functioned most effectively, attending depositions, reviewing documents, and resolving privilege questions as they arose. Without Mr. Baldwin's assistance, discovery would not have proceeded as smoothly as it did.

As amended, Baltimore Scrap's complaint advances seven counts as follows: (i) federal antitrust violations of the Sherman Act, 15 U.S.C. §1; (ii) state antitrust violations of Maryland's antitrust law, Md. Code Ann. Com. Law II § 11-204 et seq.; (iii) malicious use of process; (iv) abuse of process; (v) tortious interference with prospective advantage; (vi) fraud; and (vii) conspiracy.

III. Analysis

A. Summary Judgment Standard

Summary judgment standards apply equally to antitrust cases as to others. *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992); *Thompson Everett, Inc.* v. *National Cable Advertising, L.P.*, 57 F.3d 1317, 1322 (4th Cir. 1995). The Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). In order to survive summary judgment, the non-moving party must present evidence from which a reasonable jury could return a verdict in its favor. *Monsanto Co.* v.

Spray-Rite Service Corp., 465 U.S. 752, 768 (1984); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The complexity of antitrust cases does not make summary judgment inappropriate. On the contrary, Rule 56 may prove a particularly appropriate and useful tool for sorting out the "unusual entanglement of legal and factual issues frequently presented in antitrust cases . . . [and] is favored as a mechanism to secure the just, speedy and inexpensive determination of a case, when its proper use can avoid the cost of trial." *Thompson Everett*, 57 F.3d at 1322 (citations omitted).

The Court must take care not to foreclose trial when the case presents genuinely disputed, material facts. Nevertheless, as the Fourth Circuit made clear in *Thompson Everett*, (i) "the mere existence of some disputed facts does not require that a case go to trial," and (ii) "[t]he disputed facts must be material to an issue necessary for the proper resolution of the case, and the *quality and quantity* of the evidence offered to create a question of fact must be adequate to support a jury verdict." *Id.* at 1323 (citations omitted) (emphasis added).[24]

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[24] Thus, "if the evidence is merely colorable or not significantly probative, it may not be adequate to oppose entry of summary judgment. . . . While we have recognized generally that when considering a motion for summary judgment, the district court must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion, we hasten to add that those inferences must, in every case, fall within the range of reasonable probability and *not be so tenuous as to amount to speculation or conjecture*." *Thompson Everett*, 57 F.3d at 1323 (citations omitted) (emphasis added).

B. Noerr-Pennington Immunity

1. Background

The central premise of *Noerr-Pennington*[25] immunity is that those who petition government for redress are generally immune from antitrust liability. *See Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) ("*PRE*"). The doctrine extends to use of the courts. *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Absent aggravating "plus factors," a party, even with anti-competitive intent, may provide clandestine support for litigation instigated by another party without incurring liability. *See e.g., Liberty Lake Investments Inc.* v. *Magnuson*, 12 F.3d 155, 159 (9th Cir. 1993); *Opdyke Investment Co.* v. *City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989); *City of Cleveland* v. *Cleveland Electric Illuminating Co.*, 734 F.2d 1157, 1162 (6th Cir.), *cert. denied*, 469 U.S. 884 (1984). In *Opdyke*, the Sixth Circuit held: "[I]t would avail an antitrust plaintiff nothing to show that the defendant had surreptitiously caused a front man to institute a lawsuit against the plaintiff, even if the suit proved to be without merit, absent a showing of clear abuse of process." 883 F.2d at 1273 (citing *City of Cleveland*, 734 F.2d at 1163).

The defendants concede that their conduct was anti-competitive, but assert that it is protected by the *Noerr-Pennington* doctrine. The plaintiffs disagree. Citing two exceptions to the doctrine, they point out that *Noerr* immunity does not protect: (i) sham litigation; or (ii) litigation based on fraud. They argue that the defendants'

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[25] The doctrine was first developed by the Supreme Court in the legislative and executive context in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

actions during both the 1991 and 1992 appeals fall within these exceptions. The applicability of the two exceptions will be examined in turn.

2. The Sham Exception

The Supreme Court set out a two-part test for the "sham" exception to the *Noerr-Pennington* doctrine in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 464 (1993) ("*PRE*"). The Court held that a court may examine a litigant's subjective motivation only if the challenged litigation is "objectively baseless":

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of a sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," through the "use of the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon."

PRE, 508 U.S. at 60-61 (footnote and citations omitted).

The Court also cautioned in a footnote that an unsuccessful suit should not automatically be viewed as meritless:

> A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in post hoc reasoning by concluding" that an ultimately unsuccessful

> "action must have been unreasonable or without foundation."

Id. at 60 n.5 (citations omitted).

The plaintiff urges that the defendants' actions are unprotected by *Noerr-Pennington* because they fall within the "sham" litigation exception. BSC argues that the 1992 appeal was both objectively baseless and subjectively motivated to interfere with business relations through the use of a governmental process.

The Court must first determine if the issues raised in the zoning appeal were objectively baseless. If not, the defendants' subjective motivation in bringing the suit is irrelevant. BSC urges that the following arguments made during the 1992 appeal were frivolous:

a. Standing

Baltimore Scrap asserts that the defendants' 1992 appeal was objectively baseless because the citizens groups lacked standing to appeal. BSC adds that Gloria Sipes's motion to intervene on October 13, 1992 was also objectively baseless because it was filed out of time. In support of its argument, BSC points to deposition testimony and contemporaneous notes of Irwin and his associates showing they knew standing was problematic. As its strongest claim, BSC cites the opinion of the Court of Special Appeals: "[t]he Organizations did not have standing, and Sipes did not file a timely appeal. Sipes simply could not use Rule 2-214 to resuscitate a case that was dead on arrival in the circuit court." *Sipes*, 99 Md. App. at 99.

Because the citizens' standing argument was ultimately rejected on appeal does not mean that it was devoid of merit. It must be borne in mind that Judge Ward, after reviewing the briefs and hearing the arguments of counsel, accepted the

citizens' argument.[26] Chief Judge Hammerman stated that he had independently researched the standing issue and would likely have agreed with Judge Ward if called upon to rule. *See* DJJ Exh. C19 at 4-5. In reaching its decision on the timeliness of Sipes's intervention, the Court of Special Appeals stated it was making a "logical extension" of its standing rule. *Sipes*, 99 Md. App. at 94. The section of the Court of Special Appeals's opinion addressing the standing and intervention issues consumes 12 pages. *See id.* at 87-99. Clearly, the standing and intervention issues were not meritless questions of law to be summarily rejected. Thus, they were not "objectively baseless."

As their deposition testimony and contemporaneous notes demonstrate, Irwin and his associates were aware that they faced a difficult legal battle to establish standing. No evidence suggests, however, that they considered the standing argument hopeless. Irwin's success before two judges of the Circuit Court for Baltimore City demonstrates a reasonable basis for his litigation position. Under the objective standard enunciated in *PRE*, the subjective views of the defendants are not relevant as long as the legal standing argument urged by Irwin had objective merit, which it did.[27]

b. The Procedural Nature of the Zoning Appeals

Baltimore Scrap also argues that the citizens' zoning appeal was objectively baseless because it raised only procedural

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[26] Although no transcript of the December 7, 1992 hearing before Judge Ward exists, the plaintiff has not raised any objection to the conduct of the hearing.

[27] The Fifth Circuit has noted: "[T]o the extent the litigant has a reasonable basis for believing that his claim of standing might be accepted by the court, and thus that he will have the right to participate in the litigation process and obtain relief, he will be protected by *Noerr-Pennington* even though he ultimately loses." *In re Burlington Northern, Inc.*, 822 F.2d 518, 520 (5th Cir. 1987). The *Burlington* court went on to observe that only a party advocating a patently frivolous standing argument would lose *Noerr-Pennington* protection.

objections to the BMZA's decision, rather than challenging the substantive merits of BSC's application. BSC asserts that because the citizens only raised procedural objections, their appeal was in bad faith, as the citizens knew, or should have known, that the construction permit would ultimately be granted after the procedural defects were cured. The citizens were thus fighting a rearguard stalling action, which BSC argues should not be protected by *Noerr-Pennington*.[28]

The Court finds several flaws in BSC's argument. First, BSC argues that under Maryland law, the BMZA would have had no choice but to reapprove BSC's application on remand because the citizens groups had presented no substantive evidence in opposition to the proposed shredder. *See, e.g., Turner* v. *Hammond*, 270 Md. 41, 55, 310 A.2d 543 (1973) ("[I]f there is no probative evidence of harm or disturbance . . . a denial of an application . . . is arbitrary, capricious, and illegal." (citation omitted)). But as Chief Judge Hammerman put it at the January 7, 1993 hearing, on remand Baltimore Scrap would "have to start all over again before the Board."[29] DJJ Exh. C19 at 29. On remand, the slate

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[28] Analyzing this argument requires a brief review of the procedural history of the case. As discussed in Section II, *supra*, the BMZA rejected BSC's application on environmental grounds in November 1991. After modifying its application by proposing to add an oil/water separator and to pave the site with concrete, BSC reapplied the following year. The BMZA approved this second application on August 6, 1992.

Under Maryland law, a court reviews a zoning board's decision to determine if the decision was supported by "substantial evidence." *See, e.g., Aaron* v. *City of Baltimore*, 207 Md. 401, 406, 114 A.2d 639 (1955). In their appeal, the citizens did not attack the merits of the BMZA's environmental findings. They instead objected to alleged defects both in BSC's second application (i.e. that the second application was not significantly different from the first) and in the BMZA's approval of BSC's second application (i.e. that BSC's shredder was improperly classified as a MIRF).

[29] Because Chief Judge Hammerman found that the Board's determination that BSC's second application was substantially

would have been wiped clean and the citizens would have had a new opportunity to oppose the shredder on environmental grounds. They would have been able to present new evidence and make new arguments. It is, therefore, not a legal certainty that the BMZA would have reached the same result.

Second, procedural objections are not necessarily frivolous. Procedural rules exist so that legal questions will be decided in a fair and orderly manner. The citizens were entitled to complain that the BMZA had not followed the proper procedure. The procedural objections that the citizens raised can hardly be classified as obstructionist nitpicking. Aside from the proposed paving and oil/water separator, BSC's 1992 application was in many ways similar to its 1991 application. The Board nevertheless found that the applications were "substantially" different, and so the second application was considered and approved less than one year after the first one was rejected.[30] At the January 7, 1993 hearing, Chief Judge Hammerman found the BMZA's determination on the matter supported by substantial evidence. Nevertheless, he also stated that if he were reviewing the decision under a less restrictive standard he would not necessarily "find the same way as the Board." Thus, the citizens' objection on this issue was not objectively baseless.

Third, the BMZA's original August 6, 1992 decision was confusing and would not have been upheld absent the Gadhia affidavit. At the January 7, 1993 hearing Chief Judge Hammerman stated he was not convinced that the erroneous classification of the BSC shredder as a MIRF was a mere

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different than the first was supported by substantial evidence, that issue was not subject to review on remand.

[30] As explained in Part II.D, *supra*, once an application is rejected by the BMZA, the applicant must normally wait one year before reapplying, unless the second application is "substantially" different from the first.

"slip of the tongue." DJJ Exh. C19 at 28. The citizens cannot be faulted for having taken the appeal initially. They also cannot be faulted for later arguing that the Gadhia affidavit was inadmissible. The affidavit was not part of the agency record, and there were legitimate questions as to whether the reviewing court could consider it.[31]

c. The Relevance of the Defendants' Concealment

Baltimore Scrap next argues that the successes of the citizens groups before Judge Ward and Chief Judge Hammerman should be discounted because the involvement of the defendants was not known to the court at the time. This argument fails because under *PRE* only objectively baseless litigation is a sham. Baltimore Scrap fails to show how the legal questions raised by the citizens groups in the zoning appeal would have lacked objective merit had the role of the defendants been known.

As discussed *supra,* the questions of standing, of whether BSC's second application was substantially different from the first, of whether the BMZA applied the proper standard in approving BSC's application, and of whether the admission of the Gadhia affidavit was permissible were all questions with objective legal merit. As the Supreme Court has instructed, under *Noerr-Pennington* the merits of a case are to be examined under an objective standard. Because a case that is not objectively baseless cannot give rise to antitrust liability, the defendants' involvement in bankrolling the zoning appeal is not actionable.

3. The Fraud Exception

The Supreme Court has noted that "[m]isrepresentations, condoned in the political arena, are not immunized when

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[31] If BSC's contention were accepted, any litigant raising procedural arguments on appeal, even if the appeal were successful in forcing a remand, would face a claim that the appeal was taken in bad faith if it appeared likely that the procedural defect would be cured after remand.

used in the adjudicatory process." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). In that case, the plaintiff trucking company sued a competitor that had regularly challenged the plaintiff's application for permits. The plaintiff charged that the defendants had conspired to block the plaintiff's applications for operating rights by instituting " 'proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.' " *Id.* at 512 (citation omitted). According [to] the plaintiff, the defendants' deliberate misconduct frustrated the plaintiff from using administrative agencies and the courts to obtain operating rights. *See id.* at 518 (Stewart, J., concurring in the judgment).

The District Court dismissed the case for failure to state a claim. On appeal, the Ninth Circuit reversed. On certiorari review, the Supreme Court upheld the Ninth Circuit, holding that these tactics, if proven, were not protected by *Noerr-Pennington*. The Court drew on several earlier cases in support of its holding, noting that unethical conduct in the adjudicatory process often results in sanctions. *See, e.g., Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965) (finding use of a fraudulently obtained patent to block a competitor may trigger antitrust liability).

Courts have had some difficulty distinguishing the fraud exception from the sham exception. *Cf. Nobelpharma AB* v. *Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998) (noting *PRE* and *Walker Process* are alternative legal theories which "may be applied to the same conduct"). Although the Supreme Court clarified the requirements for sham litigation in *PRE*, it provided considerably less definition of the fraud exception. In a frequently cited footnote, the *PRE* Court took pains to leave open whether

Noerr permits the imposition of antitrust liability due to fraud, absent sham litigation.[32]

Subsequent to *PRE*, lower courts have grappled with the meaning of the fraud exception. This Court finds persuasive the Ninth Circuit's analysis in *Liberty Lake Investments Inc.* v. *Magnuson*, 12 F.3d 155 (9th Cir. 1993).[33] In that case, the Ninth Circuit read footnote 6 to mean that a defendant's fraudulent behavior will strip it of *Noerr* immunity if there is "deceptive conduct which goes to the core of a lawsuit's legitimacy." *Liberty Lake*, 12 F.3d at 158. *See also Hydranautics* v. *Filmtec Corp.*, 70 F.3d 533, 538 (9th Cir. 1995) (finding a fraudulently obtained patent nullifies antitrust immunity); *Whelan* v. *Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (giving of deliberately false statements to state securities officials not protected by *Noerr* immunity).

The *Liberty Lake* court also found that there is no exception to *Noerr* immunity absent "proof that a party's knowing fraud upon, or its intentional misrepresentations to,

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[32] The Court wrote:

In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "misrepresentations condoned in the political arena are not immunized when used in the adjudicatory process." We need not decide here whether, and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. *Cf.* Fed. R. Civ. P. 60(b) (3) . . .; *Walker Process*, 382 U.S. at 179-80 (Harlan, J., concurring).

PRE, 508 U.S. at 61-62 n.6 (some citations omitted).

Defendants suggest that footnote 6 could be interpreted to cast doubt on the survival of the fraud exception after *PRE*. While such an interpretation is plausible, it has not been adopted by any of the courts of appeal applying *PRE* and will not be adopted here.

[33] Subsequent to *PRE*, the Fourth Circuit has not yet discussed the meaning of the fraud and sham exceptions.

the court deprive the litigation of its legitimacy." 12 F.3d at 159. The soundness of this interpretation is further supported by *PRE's* emphasis in footnote 6 on Justice Harlan's concurrence in *Walker Process*, stressing that the Court's holding reached only "deliberate fraud." 382 U.S. at 179-80 (Harlan, J., concurring).

The plaintiff points to instances in which, it contends, the defendants' actions amounted to fraud, depriving the zoning appeal of its legitimacy. This Court disagrees. Although the defendants' actions were unseemly, perhaps unethical, they do not rise to the level of fraud necessary to vitiate *Noerr* immunity. The plaintiff's central problem, which it is unable to overcome, is that the arguments presented by the citizens groups were legitimate, both objectively and subjectively.[34]

a. Fraud on the Citizens' Groups

Baltimore Scrap argues that the defendants defrauded the citizens groups by failing to disclose the defendants' role in funding and steering the 1992-93 appeal. Although the purposeful concealment of the defendants' role was wrong,[35] BSC's argument fails. Several leaders of the citizens groups testified on deposition that they were "upset" by the April 1993 revelation that their benefactor was a metal shredding company. Yet, none of the citizens groups or their leaders have ever contended they were defrauded. Moreover, after the April 3 meeting in which Irwin revealed the identity of the funders, all of the groups elected to accept the financial

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[34] The plaintiff acknowledges that the citizens groups were honestly opposed to the Baltimore Scrap shredder on environmental grounds. Pl. Mem. Opp. Sum. J. at 62 n.19.

[35] It is unclear when Irwin became aware of United's role in funding the zoning appeal. In his deposition, he testified that Isaac Neuberger and Sam Wood told him in August 1992 that he would be compensated if he represented the citizens in the zoning appeal. Irwin stated he was under the impression that businesses would pay him, but he was "not especially" interested in knowing the identity of the businesses. Dep. of David Irwin at 27.

aid and continue their appeal to the Court of Special Appeals.[36]

Second, none of the deceptions the defendants committed on the citizens groups deprived the litigation of its legitimacy. The archetypal case of fraud, *Walker Process*, involved a fraudulently obtained patent. Without the patent, there was no case. Here, by contrast, the central questions raised in the zoning appeal (did the BMZA use the appropriate standard, and then later, did the Circuit Court err in accepting the Gadhia affidavit?) were legitimate, albeit somewhat thin, legal issues.

b. Fraud on the Courts

BSC points to Irwin's arguments before Chief Judge Hammerman following the exposure of the "errant fax." In his reply brief, Irwin denied that United was the "real party in interest" in the case. When Chief Judge Hammerman questioned Irwin on these subjects during the April 23 hearing, Irwin's answers were evasive. In the same reply brief, Irwin also stated that the citizens groups lacked funds to post a bond. In reality, of course, the defendants, who were funding the case, had ample financial resources.

Baltimore Scrap argues that Irwin's written and oral representations to Chief Judge Hammerman constitute fraud. Irwin's behavior may well have violated the spirit, if not the letter, of the Rules of Professional Conduct. *See, e.g., Md. Rules of Professional Conduct* 3.3, Candor Toward the

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[36] The plaintiff argues that, based on statements made in her deposition, Gloria Sipes, the individual plaintiff in the zoning appeal, would have declined to participate in the litigation had she known the true source of funds. Ms. Sipes did not state explicitly that she would have declined. Moreover, had Sipes demurred, the defendants could have found another lead plaintiff such as Mary Rosso or Doris McGuigan. For example, Ms. Rosso, leader of the Maryland Waste Coalition, testified at deposition that although she was "not happy" to find out United was behind the funding, she "really didn't give a darn." Dep. of Mary Rosso at 60.

Tribunal. But it is neither the role of antitrust law, nor of this Court, to regulate the conduct of attorneys appearing in the Circuit Court for Baltimore City. As a general rule, ethical codes do not create standards of liability for lawyers. *See, e.g., Shatz* v. *Rosenberg*, 943 F.2d 485, 492 (4th Cir. 1991). Also, when Chief Judge Hammerman denied the citizens' Motion to Stay pending appeal to the Court of Special Appeals on April 23, 1993, he stated that, despite Irwin's denials, he discerned the defendants' hand in the appeal.[37]

The courts therefore knew of the defendants' involvement at a relatively early stage of the zoning appeal. There is no evidence that any judicial rulings were predicated upon the misassumption that the citizens alone were pressing the appeal. In addition, Baltimore Scrap has produced no evidence to show that the zoning appeal would have been shorter had the courts known from the outset that the defendants were secretly advising and funding the appeal.

BSC also asserts that the defendants committed fraud on the courts by allowing the citizens groups to raise environmental concerns in their 1992 appeal. This argument has two parts. First, BSC contends that the defendants knew that BSC's shredder would be equipped with state-of-the-art pollution controls and would pose no environmental threat to the community.[38] Second, according to BSC, the defendants therefore acted fraudulently by authorizing Irwin to argue on behalf of the citizens that the BSC shredder posed an environmental risk.

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[37] Had the defendants' involvement remained concealed throughout the litigation the analysis might be different.

[38] In support of its contention, BSC cites evidence presented at the BMZA hearing supporting the environmental soundness of the proposed shredder. It also points out that the defendants themselves intended to replace their own shredder with one with environmental safeguards similar to those of the BSC shredder. *See* Pl. Mem. Opp. Sum. J. at 49-54.

The Court rejects this argument. Baltimore Scrap made informal presentations to the community groups to attempt to persuade them that the proposed shredder was equipped with environmental controls and posed no pollution risk. BSC also offered testimony to this effect at the BMZA hearings. The citizens, however, were unpersuaded. For example, the citizens groups' September 4, 1992 petition to the Circuit Court for Baltimore City, in which they sought reversal of the BMZA's approval, stated: "Appellants are concerned about the health risk posed by Brooklyn's proposed shredder, since large quantities of dust, metal fragments and disturbingly loud noises are the by-products of such an operation." DJJ Exh. C2 at 4.

BSC has produced no evidence that the citizens' environmental concerns were false or fraudulent. It is undisputed that the environmental issues raised by the citizens originated with the citizens, not the defendants. It is also undisputed that the citizens genuinely believed in the environmental concerns they raised. The environmental issues are of the type that concerned citizens are permitted to raise in opposition to a zoning application. There is no evidence that the defendants planted spurious environmental questions in the minds of the citizens. Accordingly, the defendants committed no fraud on the courts in financing the citizens' appeal.

c. Fraud on Other Agencies

The plaintiff further claims that the defendants perpetrated a fraud during the 1991 zoning appeal by having Attorney Timothy Henderson submit a report to the Baltimore Department of Planning and Zoning. The report, authored by DJJ, stated that the shredding capacity of the Baltimore scrap market exceeded demand. According to BSC, this report was false.[39]

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[39] The parties dispute the accuracy of the report. For summary judgment purposes, the Court will accept Baltimore Scrap's contention that DJJ's methodology was flawed. Even so, the

Even if BSC could establish that the report contained deliberately false information, the plaintiff has failed to demonstrate fraud. Regardless of the defendants' intent, there is no evidence that the report played a role in the BMZA decision. The Planning and Zoning Department memo concerning the Baltimore Scrap application was sent to the BMZA on October 24, 1991. *See* DJJ Exh. A3. The defendants' report was not received by the Planning and Zoning Department until November 19, the day of the BMZA hearing. Mary Dolan, head of the Coastal Resources Division of the Department of Planning and recipient of the report, stated at her deposition that she did not transmit the report to the BMZA. Dep. of Mary Dolan at 30. Finally, the unnamed BMZA member who cast the vote that denied the plaintiff's 1991 application cited environmental concerns, not size of the market, as the reason for the member's opposition.

The defendants' report was therefore not material to the 1991 BMZA decision. Without reliance on the report by the BMZA, there can be no fraud. *Cf. Interstate Properties* v. *Pyramid Co.*, 586 F.Supp. 1160, 1163 (S.D.N.Y. 1984). In *Interstate Properties*, the court found moral fault with a party's deliberate misrepresentation as to its financial interest in opposing a construction application. The misrepresentation was not actionable, however, because the state denied the application on environmental grounds. Moreover, as the Ninth Circuit observed, "a party should not as a matter of course have the accuracy of its testimony in a prior judicial proceeding subject to subsequent and collateral attack in the form of an antitrust suit." *Omni Resource Development Corp.* v. *Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984) (Kennedy, J.).

As evidence of fraud, the plaintiff also points to handwritten notes of DJJ Vice President David Wulff stating

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plaintiff cannot prove fraud; rather, it only can establish that the report was inaccurate. There is no evidence that the DJJ report contained deliberately false information.

"I.D. influenced that." *See* Plaintiffs' Exh. 25. "I.D." apparently refers to I.D. Shapiro and "that" refers to the 1991 denial of Baltimore Scrap's application. The central tenet of *Noerr-Pennington* immunity is that attempts to influence the process of government, even for anti-competitive purposes, are protected absent fraud. There is no evidence Shapiro influenced the 1991 appeal through fraudulent means such as bribery.

d. Fraud on the Plaintiff

The plaintiff argues the defendants committed fraud by attempting to lull the plaintiff into a false sense of security by suggesting that the defendants were not involved in the citizens groups' lawsuit. One of BSC's attorneys, Stanley Fine, testified at deposition that Isaac Neuberger told him in January 1993 that Irwin was "nosing around" the United shredder on Wilkens Avenue, looking for environmental problems.[40] According to Fine, Neuberger's representations were patently deceitful. As of January 1993, Irwin was working with Neuberger and being paid by United. Neuberger's misrepresentations implied that United and BSC had a common enemy in the citizens groups. Fine then revealed to Neuberger elements of BSC's legal strategy in the zoning appeal, Fine testified. *See* Dep. of Stanley Fine at 227-30; Plaintiff's Exh. 18.

Neuberger's alleged conduct, although reprehensible, would not strip the defendants of *Noerr-Pennington* protection. Any actions the defendants may have taken to put the plaintiff "off the scent" did nothing to deprive the lawsuit of its legitimacy, and are thus protected under *Noerr*. To establish fraud, BSC must show that Neuberger's alleged knowledge of BSC's strategy prolonged the appeal and caused material harm to BSC. Baltimore Scrap has not established what it would have done differently had Neuberger not contacted Fine.

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[40] It is unclear from the record who initiated the January 1993 conversation between Fine and Neuberger.

e. Maryland Zoning Law

The plaintiff contends that the zoning appeal lacked all legitimacy under Maryland law. As support, it cites a line of Maryland cases holding that a zoning appeal aimed solely at preventing competition is illegitimate as matter of law. *See, e.g., Lucky Stores* v. *Board of Appeals*, 270 Md. 513, 312 A.2d 758 (1973). The plaintiff's argument is misplaced. In *Lucky Stores*, the Maryland Court of Appeals noted that "a person whose sole interest for objection to [a] Zoning Board's action is to prevent competition with his established business is not a person aggrieved." 270 Md. at 528. In the instant case, however, the appeal was brought by the citizens groups to address environmental concerns. All parties agree that the citizens held honest objections to BSC's proposed shredder.

4. The State Law Claims

a. State Antitrust Claim

Interpretation of Maryland's antitrust law is to be "guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters." Md. Code Ann. Com. Law II § 11-202(a) (2). Because the defendants are immune from federal antitrust liability, they are likewise immune from liability under Maryland's antitrust statute, Md. Code Ann. Com. Law II § 11-204. *Cf. Hinkleman* v. *Shell Oil Co.*, 962 F.2d 372, 379 (4th Cir. 1992) ("[S]tate claims under section 11-204(a) and (b) must fail where those same claims would also fail under similar federal law") (citation omitted).

b. State Common Law Claims

The plaintiff asserts a number of state common law claims: malicious use of process, abuse of process, tortious interference with prospective advantage, fraud, and conspiracy. Because the defendants' behavior is protected from antitrust liability by the First Amendment under *Noerr-*

Pennington, it is likewise protected from state common law liability.

The plaintiff does not dispute that if *Noerr-Pennington* immunity applies to the antitrust claims it likewise applies to the state common law claims. The Fourth Circuit has noted that the policies behind *Noerr-Pennington* immunity include preserving the "first amendment right to petition government officials." *Ottensmeyer* v. *Chesapeake & Potomac Telephone Co.*, 756 F.2d 986, 993 (4th Cir. 1985). In order to protect First Amendment rights, courts have recognized that *Noerr* immunity applies to common law claims such as those raised by Baltimore Scrap. *See, e.g., Brownsville Golden Age Nursing Home, Inc.* v. *Wells*, 839 F.2d 155, 159-160 (3d Cir. 1988) (recognizing applicability of the doctrine to conspiracy, abuse of process, and other claims); *Havoco of Am., Ltd.* v. *Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (applying *Noerr* protection to claims of tortious interference with business relationships).

C. Statute of Limitations

The defendants also assert that the plaintiff's claims are barred by the relevant statute of limitations. Because the defendants' conduct is protected by *Noerr-Pennington* immunity, this issue need not be reached.

IV. Conclusion

For the reasons stated herein, the Court shall by separate Order grant the DJJ defendants' motion for summary judgment on the basis of *Noerr-Pennington* immunity, grant the Shapiro defendants' motion for summary judgment on the basis of *Noerr-Pennington* immunity, and deny as moot the Shapiro defendants' motion for summary judgment as to limitations.

Dated this 6th day of January, 2000.

/s/

Benson Everett Legg
United States District Judge